Master Plumbers Sdn Bhd v Kemajuan Amoy Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S4–22–1031 OF 2003
HARMINDAR SINGH JC
28 MAY 2009

Contract — Building contract — Claim for work done — Claims to be certified by consulting engineer — Whether consulting engineer and main contractor acted unreasonably in refusing to certify sub contractor's claim — Delay in making claim — Work done concealed and could not be seen — Whether claim impossible to evaluate — Whether unreasonable and inequitable to deny claim — Main contractor to pay reasonable sum for work done

Limitation — Contract, breach of — Time to run from date of breach — Refusal by consulting engineer to certify claim for works done under building contract — Whether cause of action arose

The plaintiff was appointed by the defendant as the sub contractor for the plumbing services for a hotel and apartment project. The defendant was the main contractor for the project. It was agreed that payments shall be certified by the Consulting Engineer Swasta Sekutu (M) Sdn Bhd ('Swasta') and made through the defendant. Problems arose with progress claim No 13 and variation orders No 10, 11, 12 and 13. These were not certified by Swasta and no payments were made. The plaintiff claimed for payment for these work. SD2, who appeared for Swasta, testified that progress claim No 13 was given to Swasta two years after the last progress claim in 1995 and it was impossible to verify after a long lapse. The reason given for the inability to ascertain the work done was because a lot of the work done had already been concealed and cannot be seen. It was also claimed that variation orders No 10, 11, 12 and 13 were only seen by SP2 sometime in 2004 or 2005 when they were produced in court. The defendant further contended that the plaintiff's claim was barred by limitation.

Held, allowing the plaintiff's claim with costs and dismissing the defendant's counterclaim with costs:

(1) Swasta and the defendant were acting unreasonably with the plaintiff's claim. No doubt the claim was made late but it is hard to accept that

it was impossible to evaluate. The site supervisor of the project had a checklist for each item to determine if the works were carried out. There were also drawings from which the works done could be ascertained. It may have been difficult but certainly not impossible. It would be unreasonable and inequitable to deny the plaintiff's claim. The defendants were obliged to pay a reasonable sum for the work done on the defendant's instructions (see paras 8 & 10).

(2) The items claimed in the variation orders were not challenged and in any event were detailed claims which appeared perfectly reasonable. The plaintiff ought to be paid the sum of RM543,765.60 as claimed in progress claim No 13 (see para 11).

(3) No evidence was adduced that variation orders No 10, 11, 12 and 13 were submitted for certification. These claims were made much later as an afterthought. It was unreasonable to expect the defendant to pay for this claim. This claim must be disallowed (see para 12).

(4) For actions founded on contract, time runs from the date of the breach. The cause of action arises at the time when the debt could first have been recovered by action or at the earliest time when an action could be brought (see para 15).

(5) Vide letter dated 28 May 1997 the plaintiff sought a definitive response from Swasta. However, Swasta vide its letter dated 16 July 1997 was being evasive and did not categorically state that they will not certify the claims. This letter coupled with the plaintiff's letter indicated for the first time that Swasta and the defendant were no longer interested in the plaintiff's claim. It was only with these two letters that it could be asserted with confidence that the plaintiff's claims were not going to be dealt with and certification of the same was highly improbable. Accordingly, time began to run only after the letter of 16 July 1997 was received. Since the claim was filed on 16 July 2003, the plaintiff was just within time and was not barred by s 6 of the Limitation Act 1953. The defence of limitation therefore failed (see para 20).

[Bahasa Malaysia summary

Plaintif dilantik oleh defendan sebagai subkontraktor untuk perkhidmatan memasang paip bagi projek hotel dan pangsapuri. Defendan merupakan kontraktor utama untuk projek tersebut. Telah dipersetujui bahawa semua bayaran perlu disahkan oleh Consulting Engineer Swasta Sekutu (M) Sdn Bhd ('Swasta') dan dibuat melalui defendan. Masalah-masalah timbul terhadap tuntutan kemajuan No 13 dan perintah-perintah ubahan No 10, 11, 12 dan 13. Tuntutan ini tidak disahkan oleh Swasta dan tiada bayaran yang dibuat. Plaintif menuntut bayaran untuk kerja-kerja tersebut. SD2,

yang mewakili Swasta, memberi keterangan bahawa tuntutan kemajuan No 13 telah diberikan kepada Swasta dua tahun selepas tuntutan kemajuan terakhir pada 1995 dan adalah mustahil untuk menentusahkannya selepas jangkamasa yang lama. Alasan diberikan kerana ketidakmampuan untuk memastikan kerja yang dilakukan kerana kebanyakan kerja yang dilakukan telahpun disembunyikan dan tidak boleh dilihat. Dihujahkan bahawa perintah-perintah ubahan No 10, 11, 12 dan 13 hanya dilihat oleh SP2 pada 2004 atau 2005 apabila ia dikemukakan di mahkamah. Defendan kemudiannya menghujah bahawa tuntutan plaintif dihalang oleh had masa.

Diputuskan, membenarkan tuntutan plaintif dengan kos dan menolak tuntutan balas defendan dengan kos:

(1) Swasta dan defendan bertindak secara tidak munasabah terhadap tuntutan plaintif. Tidak dinafikan bahawa tuntutan tersebut lambat dibuat tetapi adalah sukar untuk menerima bahawa ianya mustahil untuk dinilai. Penyelia tapak projek mempunyai senarai semakan untuk setiap perkara bagi menentukan sekiranya kerja-kerja tersebut dilakukan. Terdapat juga lukisan-lukisan daripada kerja-kerja yang dilakukan yang boleh dipastikan. Ia mungkin sukar tetapi bukannya mustahil. Adalah tidak munasabah dan tidak saksama untuk menafikan tuntutan plaintif. Defendan berkewajipan untuk membayar jumlah yang munasabah untuk kerja yang dilakukan atas arahan defendan (lihat perenggan 8 & 10).

(2) Barang-barang yang dituntut dalam perintah-perintah ubahan tidak dicabar dan merupakan tuntutan terperinci yang munasabah. Plaintif sepatutnya dibayar jumlah RM543,765.60 sepertimana yang dituntut dalam tuntutan kemajuan No 13 (lihat perenggan 11).

(3) Tiada keterangan yang dikemukakan bahawa perintah-perintah ubahan No 10, 11, 12 dan 13 diberikan untuk disahkan. Tuntutan-tuntutan ini dibuat kemudiannya. Adalah tidak munasabah mengkehendaki defendan untuk membayar tuntutan ini. Tuntutan ini tidak boleh dibenarkan (lihat perenggan 12).

(4) Untuk tindakan-tindakan yang berasaskan kontrak, masa bermula dari tarikh pelanggaran. Kausa tindakan timbul pada masa hutang tersebut boleh dituntut oleh tindakan pada mula-mula sekali atau pada masa terawal apabila tindakan tersebut dimulakan. Plaintif hanya boleh memulakan tuntutan mereka apabila jelas dan nyata bahawa tiada penilaian dan pengesahan daripada Swasta ataupun defendan (lihat perenggan 15).

(5) Melalui surat bertarikh 28 Mei 1997 plaintif meminta maklum balas yang muktamad daripada Swasta. Walau bagaimanapun, Swasta melalui suratnya yang bertarikh 16 Julai 1997 mengelak dan tidak menyatakan bahawa mereka tidak akan mengesahkan tuntutan-tuntutan tersebut. Surat ini bersama dengan surat plaintif menunjukkan buat pertama kalinya Swasta dan defendan tidak lagi berminat dengan tuntutan plaintif. Hanya dengan dua surat ini ia boleh dinyatakan bahawa tuntutan-tuntutan plaintif tidak akan dilayan dan adalah mustahil untuk mendapatkan pengesahannya. Sewajarnya, masa bermula hanya selepas surat 16 Julai 1997 diterima. Memandangkan tuntutan tersebut difailkan pada 16 Julai 2003, tindakan plaintif tepat pada masanya dan tidak dihalang oleh s 6 Akta Had Masa 1953. Oleh itu, pembelaan had masa gagal (lihat perenggan 20).]

Notes

For cases on claim for work done, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2790–2800.

For cases on time to run from date of breach, see 9 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 2271–2277.

Cases referred to

Gibbs v Guild (1881) 8 QBD 296 (refd)

Henry Boot Construction Ltd v Alstom Combined Cycles Ltd [2005] APP LR 06/16, CA (refd)

Reeves v Butcher [1891] 2 QB 509, CA (refd)

Saw Gaik Beow v Cheong Yew Weng & Ors [1989] 3 MLJ 301, HC (refd)

Sia Siew Hong & Ors v Lim Gim Chian & Anor [1995] 3 MLJ 141, CA (refd)

Legislation referred to

Limitation Act 1953 s 6

BK Lim (Lim & Keong) for the plaintiff.
Eric Tan (Lim Soh & Goonting) for the defendant.

Harmindar Singh JC:

[1] By a letter dated 1 December 1993, the plaintiff was appointed by the defendant as the sub contractor for the plumbing services for the proposed 25-storey hotel and 25-storey apartment with one storey basement on Lots 86, 87 and 88, Section 48, Jalan Ipoh, Kuala Lumpur ('the project'). The defendant was the main contractor for the project. The plaintiff now claims for work done for which they were not paid by the defendant.

A [2] The evidence disclosed that the plaintiff was awarded the contract for the tender award sum of RM1,968,000. There were some issues as to the rates and prices to be applied but in the end, it appeared that the unit rates and the schedule of prices as stated in the tender documents were used to pay the plaintiff for the work done. It was also agreed pursuant to cl 33 of the general B conditions of the tender documents that payments shall be certified by the consulting engineer, authorised by the architect and made through the defendant.

[3] During the course of the project, there were no problems as payments C were made by the defendant for progress claims No 1 to 12. These were duly certified by the consultant engineer, Swasta Sekutu (M) Sdn Bhd ('Swasta') before payments were made. The problems arose with the progress claim No 13 and the variation orders No 10, 11, 12 and 13. These were not certified by the consultant engineer and no payments were made.

D

[4] In this regard, SD2, who appeared for Swasta, testified that the amount payable will be as certified by him for each of the claims. He will certify claims only for those works that are carried out. Site inspections are held to confirm whether works as claimed by the plaintiff were indeed carried out.

E

[5] So why was progress claim No 13 not certified? SD2 testified that this claim was given to Swasta two years after the last progress claim in 1995 and it was impossible to verify after a long lapse. Furthermore, no variation orders were issued by Swasta for the works done.

F

[6] As for variation orders No 10, 11, 12 and 13, these were only seen by SP2 sometime in 2004 or 2005 when they were produced in court. They were only produced when the court ordered the plaintiff to provide further and G better particulars. SP2 was very certain that these variation orders were never forwarded to him for certification.

PROGRESS CLAIM NO 13

H [7] Progress claim No 13 essentially includes variation orders No 1 to No 9. These were prepared and submitted to Swasta for evaluation and finalisation. In response, Swasta through letters dated 2 April 1997, 22 May 1997, 30 June 1997 and 16 July 1997 asked the plaintiff to liaise directly with the defendant.

I

[8] At the outset, I must say that I did not think it was reasonable for the plaintiff to have carried out the variation works unless they were instructed to do so by the defendant or Swasta. This much was conceded by all the witnesses for the defendant including SD2 who was the certifying engineer

for Swasta. However, instead of dealing with the claim that was submitted, the correspondence between the parties left me with the impression that Swasta and the defendant were acting unreasonably with the plaintiff's claim. No doubt the claim was made late but it is hard to accept that it was impossible to evaluate. The reason given for the inability to ascertain the work done was because a lot of the work done had already been concealed and cannot be seen. However, SD3, who was the site supervisor of the project, testified that he had a checklist for each item to determine if the works were carried out. There were also drawings from which the works done could be ascertained. It may have been difficult but certainly not impossible.

[9] If it was the case that verification was impossible, it would have been reflected in some form or other in the correspondence between the parties. Instead what appears from the correspondence is the suggestion that the claim needs to be revised and that meetings need to be held to resolve the issue. There is no mention of any impossibility of certification. SD2 explained that it was not there as they wanted to resolve the issue amicably. However, this excuse sounds feeble and lame when neither Swasta nor the defendant made any serious attempt to have meetings to resolve the plaintiff's claim. Instead, they appeared to ignore all efforts by the plaintiff to seek a resolution.

[10] And why were there no meetings to resolve the plaintiff's claim? No direct reason was given but it was indicated by SD2 in his response during cross-examination. SD2 claimed that the plaintiff had written letters in a threatening tone which he (SD2) did not appreciate. Looking at the correspondence in its totality and even applying a charitable interpretation, I was unable to see how Swasta or the defendant could feel offended by the contents of the letters written by the plaintiff. On the contrary, I think any person in the position of the plaintiff would have written more assertively considering that work had been done but no corresponding effort was being made to effect payments. Conversely, Swasta or the defendant could not expect someone who has not been paid for work done to be devoid of any unhappy sentiments. Putting it plainly, I should not think that the plaintiff needed to beg for something that they were rightfully entitled to claim. In any event, the tenor of the plaintiff's letters was really irrelevant. What was significant was that this showed the unreasonable stance of Swasta and the defendant towards the plaintiff. In the circumstances, it would be unreasonable and inequitable to deny the plaintiff's claim. The defendants were obliged to pay a reasonable sum for the work done on the defendant's instructions.

[11] So how much should be paid for progress claim No 13? The items claimed in the variation orders were not challenged and in any event were

detailed claims which appeared perfectly reasonable. I would therefore consider that the plaintiff's ought to be paid the sum of RM543,765.60 as claimed in progress claim No 13.

VARIATION ORDERS NO 10, 11, 12 AND 13

[12] The defendant and Swasta claimed that these documents were never seen by them and were never forwarded by the plaintiff. No evidence was adduced that they were indeed submitted for certification. It would appear that these claims were made much later as an afterthought. This is even conceded by SP1 for the plaintiff in that variation order No 13 was prepared after the suit was filed. It would now be unreasonable to expect the defendant to pay for this claim. For these reasons, this claim must be disallowed.

LIMITATION ARGUMENT

[13] The defendant had another line of argument to deny the plaintiff's claim. They contended that the claim of the plaintiff was barred by limitation as more than six years had lapsed from the date of the breach. A determination of this issue will require a close examination of the facts and especially the sequence of events. Progress claim No 13 was dated 23 January 1997 and was presumably submitted for certification the same day or soon after. This was responded to by a letter dated 30 January 1997 by Swasta asking certain issues to be resolved. The plaintiff was then paid RM15,000 on 15 February 1997 as evidenced by the letter dated 5 March 1997. In this letter, the plaintiff sought for certification for the progress claim No 13. There were further letters by the plaintiff dated 25 March 1997, 31 March 1997, 2 April 1997, 28 May 1997 and 15 July 1997. There were responses by Swasta through their letters dated 2 April 1997, 22 May 1997, 30 June 1997 and 16 July 1997.

[14] It is pertinent to note that in the letter dated 2 April 1997, Swasta was to advise the plaintiff of a meeting to resolve the issues. In the letter dated 22 May 1997, Swasta informed the plaintiff that they would on their part be liaising with the defendant to resolve the matters raised by the plaintiff. Eventually, there was no resolution and this suit was filed by the plaintiff albeit many years later on 16 July 2003.

[15] So much for the facts. What is the law in this regard? It has been accepted that for actions founded on contract, time runs from the date of the breach (*Saw Gaik Beow v Cheong Yew Weng & Ors* [1989] 3 MLJ 301; *Gibbs v Guild* (1881) 8 QBD 296; *Sia Siew Hong & Ors v Lim Gim Chian & Anor* [1995] 3 MLJ 141).

[16] Further, in *Reeves v Butcher* [1891] 2 QB 509, it was held that the cause of action arises at the time when the debt could first have been recovered by action or at the earliest time when an action could be brought. In *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] APP LR 06/16, one of the issues raised to consider whether the claim was statute-barred was whether the right to receive payments for the value of work done and materials supplied arose upon the work being done and material supplied, or only upon the issue of a certificate. It was held that the right to payment arises when a certificate is issued or ought to be issued and not when the work is done.

[17] In the instant case, it was clear that the plaintiff was right in trying to get evaluation and certification of the works done by Swasta. If they did not attempt to do so, it would invite criticism and a valid contention that the claim was premature. In my assessment, the plaintiff could only bring their claim when it was clear and obvious that no evaluation and certification was going to be forthcoming from Swasta or the defendant.

[18] In this case, I considered that based on the correspondence produced at the trial, there was still the possibility of the certification being issued since meetings were to be held with all the relevant parties to resolve this claim. In their letter dated 2 April 1997, Swasta informed the plaintiff that a meeting date will be advised once a firm confirmation had been obtained from all the relevant parties. However, there was no mention of any meeting in any of Swasta's letters after this. Instead, the response of Swasta in their letter dated 22 May 1997 was that they could only process claims that were submitted by the defendant and that the consent of all parties was required. In their reply dated 28 May 1997, the plaintiff enquired as to why this was so. The relevant part of the letter reads as follows:

> As for your indication that '(you) can only process claims that are submitted by Kemajuan Amoy Berhad' and that 'consent from all parties are required' — can you please point out to us the relevant clause in the contract and let us have a copy of the contract as well which says this? So until today, do we take it that there is no consent from 'all parties' for the evaluation and certification of our claims, and if that is the case, why is it so? Please let us have your response and answers within 48 hours.

[19] Swasta responded vide letter dated 30 June 1997 and asked the plaintiff to direct all correspondence and liaise with the defendant. The plaintiff then sent the letter dated 15 July 1997, the relevant parts of which read as follows:

1. We are still awaiting your reply to our letter dated the 28th May,

1997 and we are puzzled as to why both your consulting firm and Kemajuan Amoy Berhad can still remain quiet until now?

2. We are believing that your response to our letter would be the proper way before we take further action against all concerned. We are now giving you final 48 hours notice to respond in a positive manner.

[20] In their last letter dated 16 July 1997, Swasta again asked the plaintiff to liaise with the defendant. It should be noted that all correspondence was also copied to the defendant. It would appear from the letter dated 28 May 1997 that the plaintiff was seeking a definitive response from Swasta. However, Swasta was being evasive and did not categorically state that they will not certify the claims. Nevertheless, I think this letter coupled with the letter by the plaintiff dated 28 May 1997 indicated for the first time that Swasta and the defendant were no longer interested in the plaintiff's claim. In my view, it was only with these two letters that it could be asserted with confidence that the plaintiff's claims were not going to be dealt with and certification of the same was highly improbable. Accordingly, I would hold that time began to run only after the letter of 16 July 1997 was received. Since the claim was filed on 16 July 2003, the plaintiff was just within time and was not barred by s 6 of the Limitation Act 1953. The defence of limitation must therefore fail.

COUNTERCLAIM OF THE DEFENDANT

[21] The defendant has also made a counterclaim against the plaintiff for overpayment for the sum of RM269,611.43. There was some evidence that some advances were made to the suppliers of the plaintiff directly at the request of the plaintiff. However, not a single document was produced to support this contention. On this account alone, the counterclaim must fail.

[22] In the circumstances, I would allow judgment for the plaintiff against the defendant for the sum of RM543,765.60 together with interest at 8%pa from the date of the summons until realisation. The plaintiff is also entitled to costs of this action. The counterclaim is dismissed with costs.

Plaintiff's claim allowed with costs and defendants counterclaim dismissed with cost.

Reported by Kanesh Sundrum